

Trump's Endgame, Part II

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The handoff of power from President Donald Trump to President-Elect Joe Biden is not going well. American law currently requires a long “transitional” period of nearly three months during which a defeated American president still holds the reins of power. The lengthy interregnum creates an opportunity for two kinds of consequential mischief.

First, the outgoing president can use the “lame duck period” to hurriedly complete projects he no longer has a democratic mandate to finish as well as to settle scores once the disciplining effect of the election is past. In short, the president still has all of the powers of the office after his democratic mandate has vanished and there are few checks on their use.

Second, the sitting president can actively make the situation worse for the incoming president by botching the transition itself or by planting little political landmines that will explode once the new president takes office. He can also delight in simply failing to perform his job, passively (or passive aggressively) leaving a bigger mess behind. In short, the outgoing president can use the lengthy transition period to sabotage the term of his successor.

Not surprisingly, Trump has been doing both.

Firing on all cylinders

Trump has been in a [giant hurry since the election to enact dozens of regulations](#) that would harm the environment, damage workers' rights, free banks to operate with less oversight, and gut consumer protection. Those regulations could be reversed but only by going back through the same process again, which at normal speed takes about two years. The American investigative journalism group [ProPublica has been tracking](#) the “midnight regulations” that have been advanced with increasing speed since Trump lost the election and it is very worth scanning through their list to see how hostile the Trump administration has been to the environment in particular. The list as a whole indicates that Trump is still firing on all cylinders to entrench as much as possible of his agenda in his administration's last days.

Trump has also raced to complete his congressionally unauthorized border wall, bulldozing through [sacred sites](#), [fragile ecosystems](#) and furious [local communities](#). Once the wall is built, the damage is largely irreversible. His government has [even awarded contracts to build on land that the federal government doesn't own](#), leaving a huge mess for his successor.

Trump has gruesomely accelerated the execution of prisoners waiting on federal death row. Between July and December, [the Trump Administration executed ten](#)

[people](#), making Trump responsible for more federal executions in the last six months than any president has carried out in a whole term at any point in the 20th or 21st centuries. (Most executions in the US are carried out by states.) To make matters worse off into the future, [one of the new regulations Trump speeded up after election day allows executions](#) across the US to be carried out by means other than lethal injection. This regulation ensures that the successful objections that death penalty lawyers have made to the cocktail of drugs used for lethal injections (and that drug manufacturers have successfully prevented from being imported into the United States) will not stop executions from proceeding. US states may now resume executing people by hanging, electric chair and firing squads.

Trump has speeded up the hardening [of anti-immigrant policies](#) by rushing into force new regulations that would reduce judicial discretion to close immigration cases, radically narrow the grounds for asylum, restrict visas of all kinds, require some people entering the US on visas to post bond that will be returned to them only when they leave the country, and tighten procedures so that minor missteps on the part of applicants for asylum result in rejecting the application altogether. This is on top of the tidal wave of restrictions on immigrations that had already taken effect before the election.

Trump is also in the midst of [destroying the media outlets like Voice of America and Radio Free Europe](#) which had once been protected under the formerly independent US Agency for Global Media. USAGM's [independence was just eliminated](#) by a new rule that has allowed Trump's newly appointed political CEO of the agency, Michael Pack, to continue gutting the agency with plans for [a final purge of employees](#) before the new administration takes office. Even though Biden indicated he would replace Pack and Trump's handpicked board, they have all [awarded each other two-year contracts](#) to stay in place after Biden becomes president.

And Trump has [taken aim at the civil service](#), issuing an executive order that allows him to reclassify a large part of the federal workforce into a newly created employment category that will reduce their protection from political retaliation and turn them into an "at will" labor force that can be fired at any time. The constitutional theory under which Trump believes that he can weather the legal challenges already launched against this executive order is [an extension of the "unitary executive theory"](#) defended by many conservative constitutional lawyers, holding that the branch as elaborated in the constitution is under the unitary control of the president, which gives him power over all departments and agencies of the federal government. The transfer of civil service employees to this new status is scheduled to take effect on 19 January. Trump leaves office the next day after the damage has been done.

On the settling-scores front, Trump has issued [outrageous pardons](#) to people who have lied on his behalf. He has also made clear that [killing non-Americans should not result in jail time](#) in the US, since he has pardoned military men who violated the Uniform Code of Military Justice, military contractors who executed civilians in Iraq and US border guards who killed unarmed immigrants. Most believe that he will issue a huge set of pardons of family and friends before he leaves office, perhaps including a giant pardon for himself in a [corruption-of-justice binge](#).

As Trump has raged against the election results, he has also purged his administration of those who have dared to publicly doubt that he won the election or to criticize his actions. He [not only fired his defense secretary](#), but also [packed other high-level positions at the Pentagon](#) with loyalists. He [fired the attorney general](#) so that the former deputy attorney general, less experienced and potentially more malleable, occupies that office in Trump's last days. In fact, his whole term has been characterized by [exceptionally high administrative turnover](#), as those who tried to rein him in found themselves thrown out of office. In these last days, Trump is surrounded by the extreme loyalists who defend everything he has done, including the election challenges.

Disregard of responsibility

As for laying landmines that will blow up when Biden takes office, it is clear that some of Trump's political appointees have been blocking an orderly transition. By law, Biden's team should be able to learn where things stand in all departments and agencies before they take office so that they are well informed to pick up where the Trump team leaves off.

The formal law that governs this process is the [Presidential Transition Act](#) of 1963, which entrusts the preparations for a handoff primarily to civil servants rather than political appointees in order to minimize the political tensions of transition. The General Services Administration is the designated lead agency. As an independent agency, the GSA has not had a history of being at the center of political machinations and it generally handles relatively apolitical matters like building maintenance, supplies, transportation and communications for the federal government as a whole. During a presidential transition, it is charged with providing everything from office space to funding for the incoming presidential team as soon as the GSA administrator "ascertains" who won the election. This year, uniquely, the administrator – a Trump appointee – refused to find Biden the winner of the election until three weeks after all of the conventional sources had, obviously waiting for Trump to concede, which is neither required by the law nor bears any legal weight. Eventually, [the GSA administrator allowed the transition to move forward](#), having held it up for nearly one-third of the transition's duration.

But the transition has not run smoothly even after it was given a green light. [Biden recently called out the Defense Department in particular](#) for refusing to hold briefings for the incoming team (not surprising in light of the fact that Trump just packed the top echelons of the Pentagon with his own loyalists since the election). In many agencies where the briefings of the Biden team should be conducted by high-level civil servants, [Trump loyalists have been sitting in](#), perhaps to prevent the civil servants from speaking too forthrightly. This has affected briefings at the Environmental Protection Agency and the State Department. For weeks before Biden publicly criticized them, the Defense Department and intelligence services were blocking meetings or refusing to meet without political officials present. And recall that all of these briefings are going on as Trump's executive order reclassifying civil service positions as at-will jobs is being executed by the very political officials who have shown interest in how the Biden team is being briefed by civil servants.

Obsessed with overturning the election results, Trump has shown no interest in day-to-day governing. For months, he has paid little attention to the pandemic which takes more lives each day than the US lost in the Pearl Harbor attack that launched the US into WWII and which takes nearly as many lives each day as were lost on 9/11. But of course, those two landmark dates were one-off events, while the pandemic takes that many lives every day, day after day – which makes it all the more remarkable that Trump says nothing whatsoever about it.

Worse yet, Trump has refused to do anything about the pandemic, either its causes or its effects. His White House hosted nearly [20 maskless holiday parties](#) and he has refused to publicly endorse basic public health measures. Trump failed to participate in the legislative process that would have provided a financial lifeline to the millions of people left unemployed by the pandemic and to the many small businesses teetering on the brink of collapse. The coronavirus bill that eventually passed Congress without his active assistance also aimed to provide money for opening schools and distributing vaccines throughout the country – and more. But Trump railed against the bill when it landed on his desk in Florida where he was already on vacation. He threatened not to sign it – and went off to pout and play golf just long enough for his eventual signature on the bill to come too late to provide continuous support to those who relied on provisions of the earlier coronavirus support bill. Now millions will be thrown off unemployment insurance, face a dangerous gap in their financial support or lose their protection from eviction while waiting for the new money and legal guarantees to kick in. Trump is taking out his anger in gratuitous cruelty against those who have suffered most in the pandemic.

Failing to sign the coronavirus bill in time to genuinely help people is just one example of Trump's dangerous disregard of responsibility. In his continued pique, Trump also vetoed the defense appropriations bill, leaving the military without funding just after the US suffered [its largest hostile cyberattack](#) and while the military has been tasked with aiding in the distribution of the vaccine. He gave as a reason for his veto that he opposed the provision that would have stripped from military bases the names of Civil War Confederate generals (yes, the ones who fought for the South and lost). Congress, for the first time in the entire Trump presidency, [overrode his veto](#). Trump even toyed with refusing to authorize a temporary budget extension that would keep the federal government from shutting down in the middle of a pandemic. He approved the stopgap funding just as the government was preparing to close. Trump refuses to perform the bare minimum tasks of governing. That leaves the situation even worse for his successor.

Two and a half months

So why does the US have such a long transition between governments when such transitions can clearly create new problems for democratic government? America's presidential election must by law take place in early November, but the president elected on that day takes office according to the Constitution only on 20 January of the next year. That's a very long time for an outgoing president to have full control of the government after the voters have ordered him to leave office.

It used to be worse.

Both election day and inauguration day were originally set by federal statute. At first, federal law permitted the states to hold presidential elections whenever they wanted in the 34 days before the first Wednesday in December every fourth year. But then a common federal election day for both presidential and congressional elections was (and still is) fixed by the Presidential Election Day Act of 1845 at the first Tuesday after the first Monday in November. Inauguration day for the president was fixed in a late 18th century statute at 4 March, to give those elected time to travel to the capital after the worst of winter was over. The two statutes taken together defined the length of the “transition” between governments.

Originally four full months, this interregnum repeatedly made the United States vulnerable. In 1860, President-Elect Abraham Lincoln watched helplessly as seven states seceded from the Union after the election but before he could be sworn in, setting the stage for the Civil War. The issue arose again vividly in [the 1932 transition from Herbert Hoover to Franklin Roosevelt](#). The economy was melting down in the Great Depression but Hoover believed that the program Roosevelt had proposed to rescue the economy was illegitimate so Hoover refused to cooperate with the transition of power to Roosevelt. The vulnerability of the United States during these transitions was clear. The transition period was shortened to its present length of a bit more than two and a half months by the 20th Amendment to the Constitution ratified in 1933.

If the dates of the election and inauguration were given by statute, why did it take a constitutional amendment to move up inauguration day from March to January? The first time that the new inauguration date was invoked shortened the constitutionally prescribed four-year presidential term of office by six weeks. So, as the thought then went, this required a constitutional amendment.

Now the US is stuck with it. To further shorten the transition now requires either amending the Constitution again to move back the inauguration date or moving up the federal election date into American Thanksgiving and the holiday season. The first is impossible because in the present climate of polarization nothing that requires that much political consensus would pass and the second would be problematic because it would likely result in lowered election turnout due to holiday preparations and bad weather. The US, then, may be stuck with a long transition for a long time.

The current disastrous and dangerous American transition should prompt another rethink. But of all of the problems that American democracy faces at our present fragile moment, just getting through this difficult transition will throw other even bigger problems into sharper relief. No one expects Trump and his noisy supporters to simply disappear, and no one expects that Biden will be able to easily mend the wounds that have been opened by an aspirational autocrat who has very nearly succeeded in hanging onto power despite everything. The inauguration of a new president in the United States will allow many around the world to unclench a little bit, but no one should believe that this one election – contested as it has been – has made America an unproblematic democracy again.

